

In re: SUN WORLD INTERNATIONAL, INC.
AMA Docket No. F&V 925-1.
Decision and Order.
Filed November 7, 2002.

AMAA – Grapes – 15A proceedings – Rule making – Decision criteria.

The Secretary created a regional grape marketing order which did not provide criteria or guidelines for the producer's committee other than the "primary objective of promoting the orderly marketing of grapes." The Administrative Law Judge (ALJ) directed the regional grape producer committee operating under the marketing order to formulate rules and regulations relating the granting or withholding of a request for suspension of a "picking holiday." The committee had heretofore operated granted or rejected the application of a "picking holiday" based upon a informal telephone role call without any reason required to be given. Petitioner contended that the present voting methods of the committee did not reflect the needs of a minority producer which was adversely affected by non-US grape producers and which were not operating under any "picking holiday."

Brian C. Leighton, for Complainant.

Brian T. Hill, for Respondent.

Decision and Order by Chief Administrative Law Judge, James W. Hunt.

Decision

This is a proceeding under section 15(a) of the Agricultural Marketing Agreement Act of 1937, as amended, (7 U.S.C. § 608c(15)(A))("Act"), and the Order regulating the handling of grapes in a designated area of South-Eastern California (9 C.F.R. § 925) ("Order"). In an amended petition, Petitioner, Sun World International, Inc., seeks a modification of certain provisions of the Order, and/or an exemption therefrom, or from any decision or obligation that is not in accordance with law imposed by the Committee that administers the Order. In its answer, Respondent, Agricultural Marketing Service, United States Department of Agriculture, states that the Act and Order "as interpreted by Respondent and his agents and employees, were and are fully in accordance with law and binding on Petitioner" and that the amended petition should therefore be dismissed.

A hearing was held on May 8, 2002, in Palm Springs, California. Petitioner was represented by Brian C. Leighton, Esq. Respondent was represented by Brian T. Hill, Esq.

Facts

Petitioner, Sun World International Inc., ("Sun World") has its principal business address at 16350 Driver Road, Bakersfield, California 93308. Its operations include producing, packing, marketing and shipping grapes in Coachella Valley, Riverside County, California, an area covered by a Marketing Order regulating the handling of table grapes grown in South-Eastern California. Sun World is the third or fourth largest grape producer in Coachella Valley.

Sun World markets its grapes in all states and in some foreign countries. It has developed and holds patents on the grape varieties it grows which, it says, are distinct from other grapes grown in Coachella Valley. It markets the grapes under their tradenames.

The grape harvesting season in Coachella starts in May when the Perlet, a variety grown by other producers but not by Sun World, ripens. The next varieties to ripen and be harvested are Sun World's Superior Seedless, Coachella Seedless and Midnight Beauty. The next variety to ripen is the Thompson which is grown by other producers. There is some overlap in the harvesting of the Perlets and Sun World's Superior Seedless and then again some overlap in the Superiors and the Thompsons. However, there is a "window" when only Superiors are picked. According to Kevin Andrew, Sun World's Senior Vice President for Operations, there are about two weeks during the season when Superiors constitute the bulk of the grapes being harvested. Sun World says that many retailers prefer its Superiors to other varieties and that the only competition for its Superiors comes from Arizona and Mexico where a variety similar to the Superior is grown. Sun World says that the Mexican grape is a "rip off" of its Superior Seedless brand. (Tr. 19-21, 25, 94, 246-247.)

After the grapes are picked they are packed in containers and then placed in a cooler for four to six hours until they are cool enough to ship. Sun World states that it tries to ship the grapes soon after they are harvested when they are in optimum condition and that the price for grapes is highest at the beginning of the season and then declines towards the end. (Tr. 22, 23, 45, 75.)

The Marketing Order allows grapes to be packed in containers for shipment Monday through Friday, but prohibits them from being packed on Saturday, Sunday, Memorial Day, or the Fourth of July. This is referred to by industry members as the "picking holiday." However, the Marketing Order gives the Committee administering the Order the discretion to allow a suspension of the picking holiday. The twelve-person Committee is comprised of producers and handlers. Sun World has one representative on the Committee.

Sun World states that as a result of the picking holiday it sometimes has no grapes to market on Sunday after it has sold those packed on Friday even though there is a demand for its grapes on weekends from its customers. It states that it sells to retailers like Albertsons, as well as making some spot market sales, and that its customers want to receive its grapes on Sunday as well as on other days. It says it prefers to make commitments to its customers in advance that it will supply them with grapes. It contends that it is not feasible to hire untrained extra labor to harvest and store grapes to meet its weekend demand, that it is not economically feasible to spend millions for more cooling storage capacity that will be used for only a few

days, and that the quality of the grapes also diminish when they are stored. It says that when grapes are ready for harvesting they do not “take the weekend off” and that the inability to pack grapes on a weekend extends the four or five week harvest season for the Superiors an extra week when the price for the grapes declines. (Tr. 22, 127.)

Sun World alleges that, while the Committee has granted requests for a suspension of the picking holiday for other producers, it has declined requests from Sun World to suspend the holiday when it is harvesting its grapes.

In 2001, Sun World requested permission from the Committee to pack grapes on Saturday, June 16, and Saturday June 23. The request for June 23 was to pack its Coachella Seedless, Superior Seedless, and Midnight Beauty. The requests were denied. Mike Aiton, Sun World’s Senior Vice President for Sales and Marketing, testified he has never been given a reason for a denial of Sun World’s request for a suspension. He said that when he discussed the matter with Committee members he was told that Sun World should hire more workers, get a larger cooler, and not pack so many varieties of grapes. He said that these are attempts to tell Sun World how to run its business whereas the reason for the picking holiday is to control volume and prices and that at the time the Marketing Order was adopted Coachella produced almost one hundred percent of the table grapes. Now, he said, Coachella no longer controls the market price because of competition from Mexico which has no picking holiday. (Tr. 36, 64, 107, 120, 135.)

Andrew said that there was no oversupply of grapes when Sun World requested a suspension for June 23. Timothy Shaheen, Sun World President, testified that when Sun World’s request for a suspension of the picking holiday was denied it was unable to fulfill its commitment to supply Albertsons with its Coachella-grown grapes and had to obtain grapes from Mexico. (Tr. 79, 121, 125, 135.)

When a producer files a request for a suspension of the picking holiday, the Chairman of the Committee directs the Committee manager to poll the Committee members by phone. The person making the request is not identified. The Committee members do not discuss the request and do not have to give any reason for their vote. The Manager then records the results of the vote. Robert Bianco, former Committee Chairman, said that most requests are denied. He also said that although the name of the person making the request is not disclosed, producers all know what their “neighbors are doing” and the current chairman, Mike Bozick, said that Committee members know what grapes are being picked. Respondent, Agricultural Marketing Service (“AMS”), is notified of the vote result but does not approve or disapprove. The decision whether to suspend or not to suspend the picking holiday is entirely up to the Committee. (Tr. 175, 202-203, 215, 243, 245.)

Neither Respondent nor the Committee presented any standards that the Committee is to consider in deciding whether to allow a suspension of the picking holiday. Bozick testified that the Marketing Order is for the benefit of the industry and that the picking holiday should be suspended only if all producers are affected

and should not be suspended just for the benefit of one producer. He believed that this criteria was understood by Committee members. He cited weather conditions and the inability of all producers to get their grapes to market as two examples of reasons for allowing a suspension of the picking holiday. (Tr. 156, 158, 176-177, 185, 191-192, 201.)

Bozick said that the production of Coachella grapes has not declined, but that its percentage of the market has decreased and that it would be “disastrous” not to have a picking holiday. He testified that “Nobody buys grapes on Saturday or Sunday, nobody.” He said that on Monday morning the wholesale market is down and that it is also a traditionally bad marketing day with few shipments and low prices. However, he said that he did not know if this was true for the sale of Sun World’s grapes. Bozick said he can “play the market” by storing his grapes in a cooler for up to three or four weeks to wait for a higher price. He said he voted no to Sun World’s request for a suspension on June 23, 2001, because of the volume of grapes on the market. However, he also said that he did not know the supply of Sun World’s Superior Seedless grapes at the time. (Tr. 79, 156, 157, 170-172, 181, 188, 197.)

Robert Bianco, former Chairman of the Committee, testified that Respondent AMS has never provided the Committee with any information that the Committee is to consider in deciding whether to suspend the picking holiday. He said it “wouldn’t be right” and “doesn’t work” to suspend the holiday for just one grower because “if we let one do it then another person would do it and then another person. You wouldn’t be able to trust everybody that came in and told you I have a willing buyer.” He testified that when grapes are picked on Saturday there are more picked than can be sold and that this creates an excess supply which depresses the price, but that in a “very rare situation” there would be no oversupply if the producer had a customer for the grapes it picked on Saturday. He said a vote on a suspension could be based on any reason and that when he voted for a suspension it had been because of the weather, a “late season,” or some “anomaly.” He also said he had voted for a late season suspension when only one to three persons were affected because he did not think it “makes any difference.” (Tr. 212, 219-220, 228, 235, 237.)

Bianco said that Perlets and Thompsons compete with Sun World’s Superior Seedless but that there is a window when only Superiors are available. He acknowledged that some grocery chains specifically ask for Superiors, but said that to allow the chains to “dictate what an industry is going to do” does not provide for an “orderly market.” (Tr. 247-248.)

Discussion

“Grapes Grown in a Designated Area of South-Eastern California,” the marketing order involved in this proceeding, is set forth in 7 C.F.R. § 925 *et seq.* Section 925.52 provides:

(a) The Secretary shall regulate, in the manner specified in this section, the handling of grapes upon finding from the recommendations and information submitted by the committee, or from other available information, that such regulation would tend to effectuate the declared policy of the act. Such regulation may . . . (5) establish holidays by prohibiting the packing of all varieties of grapes during a specified period or periods.

7 C.F.R. § 925.304 provides for the establishment of such holidays:

During the period April 20 through August 15 of each year, no person shall pack or repack any variety of grapes except Emperor, Almeria, Calmeria, and Ribier varieties, on any Saturday, Sunday, Memorial Day, or the observed Independence Day holiday, unless approved in accordance with paragraph (e) of this section, nor handle any variety of grapes except Emperor, Calmeria, Almeria, and Ribier varieties, unless such grapes meet the requirements in this section. . . .

The Secretary stated that the purpose of the picking holiday was to “avoid an oversupply of grapes early in the week.” 51 FR 10220 (March 25, 1986).

Section 925.20 of the Order provides for the establishment of a committee to administer the Order (California Desert Grape Administrative Committee) whose powers, as set forth in section 925.28, include “To make and adopt rules and regulations to effectuate the terms and provisions of this part.” The Committee’s authority includes, in section 925.304(e), the power to suspend the picking holiday: “Upon approval of the committee, the prohibition against packing or repacking grapes on any Saturday or Sunday, or on the Memorial Day or Independence Day holidays of each year, may be modified or suspended to permit the handling of grapes provided such handling complies with procedures and safeguards specified by the committee.”

This action and other actions by the Committee are subject to the Secretary’s (i.e. AMS’) review: “Each and every regulation, decision, determination or other act of the committee shall be subject to the continuing right of the Secretary to disapprove of the same at any time.” (7 C.F.R. § 925.62.)

Sun World contends that section 925.304(e) of the Order (7 C.F.R. § 925.304(e)) is unlawful and should be set aside because the Secretary is not involved in the decision whether to suspend the picking holiday; that the Order requiring a picking holiday is arbitrary and capricious because at the time the Order was adopted providing for a picking holiday Coachella had one hundred percent control of the table grape market whereas since then it has lost market shares to

Mexico; that the delegation to the Committee to allow a suspension of the picking holiday is unlawful because the delegation does not provide “any criteria, rules, regulations, or even any involvement by USDA”; and that the authority of the Committee to suspend or not to suspend the picking holiday is not in accordance with law under 5 U.S.C. § 706(2)(A). This statutory provision provides that “The reviewing court shall - . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . .”

Respondent, AMS, denies Sun World’s allegations and urges that the petition be dismissed.

The Secretary may delegate decision-making authority in a marketing order to an administrative committee comprised of industry members.

Congress has approved the use of such producer-controlled committees on the theory that the most sound decisions will result from permitting those in the area with the greatest knowledge of the industry’s needs to make recommendations to the Secretary. *Chiglaides Farm LTD v. Butz*, 485 F.2d 1125, 1134 (5th Cir. 1973).

The Secretary does not have to be involved in the committee’s decision-making as long as the Secretary retains the ultimate authority to review and void decisions by the committee. *Wileman Bros, et al.*, 49 Agric. Dec., 705, 822 (1990).

In this proceeding, the Secretary (AMS), while not involved in the Committee’s decisions concerning whether to suspend the picking holiday, was informed of the Committee’s actions. As the Order (7 C.F.R. § 925.62) clearly provides that the Secretary retains ultimate authority to void actions by the Committee, the delegation in itself was not unlawful.

Sun World’s contention that changed circumstances (decline in market share) now makes the picking holiday invalid is likewise without merit. The Order’s validity must be judged on the circumstances contained in the rulemaking record on which the Secretary based the Order and not on the circumstances presented later in a proceeding brought under section (15)(A) of the Act. Therefore, if as Sun World contends “circumstances have changed so that the Order no longer produces equitable results, the remedy is through the amendatory process -- not through a § 8c(15)(A) proceeding.” *Sequoia Orange Co., Inc.*, 41 Agric. Dec. 1511, 1522 (1982). “[A]ny new, relevant evidence bearing upon the validity of the Order must be presented first to the Secretary in his legislative [rulemaking] and not in his judicial [(15)(A)] capacity.” *Belridge Packing Corp.*, 48 Agric. Dec. 16, 38 (1989). The Order overall is therefore presumed valid until such time as the Secretary

determines otherwise.

However, there is merit in Sun World's challenge to Respondent's delegation of authority to the Committee on the ground that the Committee was not provided "any criteria" to guide it in the exercise of its authority.

When an agency delegates decision-making authority to a private party, as Respondent has done here in its legislative (rulemaking) capacity by delegating authority to a Committee comprised of the grape industry's producers and handlers, the agency has the responsibility to provide guidance in the form of standards that the party is to follow in exercising its delegated authority.

These [omitted] opinions still stand for the proposition that a legislative body cannot constitutionally delegate to private parties the power to determine the nature of rights to property in which other individuals have a property interest, without supplying standards to guide the private parties' discretion. Otherwise, "administrative decision-making [will be] made potentially subservient to selfish or arbitrary motivation or the whims of local taste." *General Elec. v. New York State Dept. of Labor*, 936 F.2d 1448, 1455 (CA 2 1991).

The Committee has admittedly received no guidelines from Respondent on how to exercise its delegated authority to suspend the picking holiday. The only standard that can be inferred from the Order itself is that a suspension not create an oversupply of grapes. The Committee, however, did not contend that a suspension permitting Sun World to pack its grapes on the specified Saturdays would have adversely affected other producers and it did not deny that Sun World had retail customers for the grapes it proposed to pack on Saturday so as not to create an oversupply. I also find that Sun World had customers for the grapes it would have packed on Saturday. The Committee's justification for its denial of Sun World's request for a suspension of the picking holiday is its claim that the Order is for the benefit of all members of the industry and that whether a suspension should be allowed should be based on whether it will benefit all industry members and not just one.

When the regulations were promulgated, however, the Secretary stated that the Order's "primary objective is to promote orderly marketing of grapes. Consumers would benefit from a consistent supply of good quality fruit and growers would benefit from an expanded market." 45 FR 40565 (June 16, 1980). Nothing was said about preventing one producer from benefiting from a suspension as long as other producers would not be adversely affected, that is, the suspension would not create an oversupply of grapes.

As for the contention that the industry should not be dictated to by retailers who want grapes supplied to them on Sunday, this argument ignores the Secretary's intent that an objective of the Order is to benefit consumers as well as the industry.

The demand by some retailers for Sun World's grapes on Sunday reflects consumer demand for, as the Order puts it, "a consistent supply of good quality fruit." The Committee's actions with respect to Sun World's attempt to satisfy this consumer demand when a suspension would not create an oversupply of grapes would appear to frustrate that objective.

Even assuming that the Committee's contention that a suspension should be allowed only if all industry members benefit is valid, the record fails to show that this was actually the reason followed by Committee members.¹ Rather, it shows that Committee members did not have to give any reason for the way they voted and Sun World was never given a reason. Moreover, the record shows that if this was a standard followed by some members, it was not a standard they consistently followed. They had allowed suspensions when only three persons, and possibly only one, would benefit. (Tr. 212.)

I find that there were no standards for the Committee to follow when it made decisions on Sun World's requests to suspend the picking holiday. The delegation by Respondent to the Committee of this decision-making authority without providing rational standards for the Committee to follow is not in accordance with law under 5 U.S.C. § 706(2)(A).

Respondent shall be directed to void all decisions that may be made by the Committee concerning whether to suspend the picking holiday without standards prescribed by Respondent for the Committee to follow in exercising its decision-making authority under 5 C.F.R. § 925.304(e).

¹In its brief (page 12) Respondent appears to adopt this argument. Furthermore, any action taken by the Committee is considered that of the Secretary. *Chiglaes Farm LTD, supra*. When Respondent, or its agent the Committee (*Kyer v. United States*, 369 F.2d 714, 717 (Ct.Cl. 1966)), makes a decision affecting the property interests of other persons (such as the ability of grape producers to market their product), they cannot do so on an *ad hoc* basis. *Morton v. Ruiz*, 415 U.S. 1055, 1073 (1974). They must articulate a rational reason for their decision in order to withstand a challenge to the decision as being arbitrary or capricious and therefore invalid under 5 U.S.C. § 706(2)(A):

The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut.*, 463 U.S. 27, 41 (1983).

The contention that the only consideration in deciding whether to permit a suspension of the picking holiday is whether all industry members will benefit is not a satisfactory reason under the Order which has broader objectives. It may, however, conceivably be one of the factors for the Committee to consider.

Findings of Fact

1. Petitioner, Sun World International, Inc., (“Sun World”) produces, packs, markets and ships table grapes it grows in Coachella Valley, Riverside County, California.
2. Sun World’s business address is 16350 Driver Road, Bakersfield, California 93308.
3. Sun World’s grape operations in Coachella Valley are subject to a Market order for Grapes Grown in a Designated Area of South-Eastern California (“Order”) (7 C.F.R. § 925).
4. The Order is administered by the California Desert Grape Administrative Committee (“Committee”) (5 C.F.R. § 925.20).
5. The Committee is an agent of Respondent Agricultural Marketing Service.
6. The Order provides for a “picking holiday” when persons subject to the Order may not pack grapes (5 C.F.R. § 304).
7. The Order provides that the Committee may suspend the picking holiday (5 C.F.R. § 925.304(e)).
8. There were no standards for the Committee to follow when it made decisions whether to suspend the picking holiday.

Conclusion of Law

The Committee’s failure to follow any standards for its decisions whether to suspend the picking holiday under 5 C.F.R. § 925.304(e) is not in accordance with law and is therefore in violation of 5 U.S.C.706(2)(A).

Order

Respondent, Agricultural Marketing Service, is directed to void any decision that may be made by the California Desert Grape Administrative Committee under 5 C.F.R. 925.304(e) that does not follow standards prescribed by Respondent.

This Decision will become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer by a party to the proceeding within 30 days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139, 1.145).
